INDEX

	Page
Petition	1
Question presented	1
Statement	2
Specification of error to be urged	11
Reasons for granting the writ	12
Brief in support of petition:	
Opinions below	14
Jurisdiction	14
Question presented, statement, etc	14
Argument—	
I. The arrests were lawful	14
II. Since the arrests were lawful, search of the premises where they were made was lawful; and that search was not unreasonable	16
Conclusion	24
Appendix (Statute involved)	26

CITATIONS

Cases:	
Agnello v. *United States*, 269 U. S. 20	23
Ash v. *United States*, 299 Fed. 277	15
Brady v. *United States*, 300 Fed. 540, certiorari denied, 266 U. S. 620	15
Carroll v. *United States*, 267 U. S. 132	23
Go-Bart Co. v. *United States*, 282 U. S. 344	12, 17, 18–19, 24
Kurtz v. *Moffitt*, 115 U. S. 487	15
Lambert v. *United States*, 282 Fed. 413	15
Marron v. *United States*, 275 U. S. 192	12, 16, 18, 22
United States v. *Lee*, 274 U. S. 559	23
Statute:	
National Prohibition Act, c. 85, 41 Stat. 305, 313, 316—	
Sec. 19 (U. S. C., Title 27, Sec. 31)	15, 26
Sec. 29 (U. S. C., Title 27, Sec. 46)	26

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL M. LEFKOWITZ AND PAULINE PARK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled cause on July 21, 1931 (R. 113), reversing in part an order of the District Court for the Southern District of New York (R. 92), denying an application for the suppression of evidence and the return of seized books and papers.

QUESTION PRESENTED

Whether the respondents are entitled to the return of books and papers the search for and seizure

of which are alleged to have been illegal, and to the suppression of the evidence obtained by means of the search and seizure.

STATEMENT

This was an application by the respondents for an order directing the suppression of evidence and the return of books and papers seized on the premises at 1547 Broadway, Room 604, New York City, where the respondent Lefkowitz maintained an office and the respondent Paris was employed as a stenographer. In support of the application, the respondents filed affidavits alleging that they had been arrested on the premises in question by Federal officers; that the officers thereupon searched the premises, including the waste paper baskets and the drawers of desks, and took and carried away certain books, papers, and records, which articles were then in the possession of an Assistant United States Attorney who had refused a demand for their return; that at no time during the search and seizure did the officers exhibit any warrant of arrest or search warrant; and that the search and seizure were in violation of the deponents' rights under the Fourth and Fifth Amendments. (R. 5–16.)

Affidavits were filed in response. It appears from them and the exhibits that the circumstances leading to the arrests and search and seizure were

substantially as follows:[1] In July, 1930, Special Agent Hugo of the Bureau of Prohibition was assigned the duty of investigating a report that one Henry Miller, who gave his address as 1547 Broadway, Room 604, New York City, was soliciting orders for intoxicating liquors by mail. Hugo was given several letters addressed by the B. & O. Novelty Company and by Henry Miller to C. F. Odell, Davenport, Oklahoma, regarding a price list of liquor and requesting orders for liquor. One of these letters, with the letterhead "Henry Miller," had, at the bottom thereof, "formerly the B. & O. Novelty." (R. 50–51.)

Writing from Buffalo, New York, over the signature of "Anthony Craig," and representing that he had been referred to Miller by C. F. Odell, Hugo thereafter engaged in an extended correspondence with Miller at the business address above mentioned, in the course of which he received price lists of whiskies, brandies, and wines offered by Miller for sale and was advised that he should procure in advance a New York draft covering any order he should send. (R. 51–54.). On October 27, 1930, Hugo wrote Miller, enclosing a New York draft for $55 and ordering one case of Scotch whiskey to be sent immediately. Miller replied under date of October 28, 1930, thanking him for the check and

[1] The facts are stated at length in an effort to show that the procedure of the Prohibition Agents before the arrests was in all respects regular.

order and advising: "Merchandise leaves to-day." Hugo later obtained from the railway express agency at Buffalo two packages addressed to "Anthony Craig," and upon examining them found that they contained bottles of Scotch whiskey. (R. 54–55.)

Thereafter Hugo wrote Miller that he had not received the whiskey ordered by him. Miller replied that he was putting a tracer on the lost shipment and would advise as to the result within a few days. Hugo then prepared a letter addressed to Miller introducing one Jose Hernandez and advising that Hernandez had been authorized by him (Craig) to receive from Miller liquor to replace that alleged to have been lost. Posing as Hernandez, Hugo went to Room 604, 1547 Broadway, New York City, presented the letter to a young lady whom he found there and whom he later learned was Pauline Paris, and told her that he was a friend of Anthony Craig and had come to inquire about the delivery of a case of liquor for which Craig had paid but which he had not received. She informed him that Miller would probably be in the office the next day and suggested that he come back and take the matter up directly with Miller. (R. 56–57.)

Hugo later visited Room 604 on two occasions, being accompanied each time by Special Agent Olivera. He introduced Olivera to Pauline Paris as Manuel Negroni and told her that he desired

that the case of liquor which was to be delivered to him in place of the one lost in shipment should be delivered to Negroni. At her suggestion he left an address, in New York City, where the liquor could be sent, and she promised that it would be delivered at any time Negroni would specify. Hugo then remarked that Negroni would like to sell whiskey to his friends and asked whether it would not be possible for Miller to lower his prices so that Negroni could make a little profit. She replied that she would arrange a meeting between Miller and Negroni to discuss lower prices for the wholesale buying of liquor from Miller. She gave Hugo a slip of paper upon which she had written "Chickering 4-8928" and told him to call that telephone number on January 5, 1931, to arrange a meeting between Negroni and Miller. (R. 57–58.) On January 12, 1931, Hugo received in Buffalo a letter addressed to Anthony Craig upon a letterhead inscribed "William Salmon, 1547 Broadway, Room 604, New York City," announcing that, pursuant to his custom of changing his name every year, the writer had changed his name "to the above." The letter was signed "William Salmon, Formerly Henry Miller." (R. 58–59.)

At various times in January, 1931, before the 12th of that month, Agent Olivera, representing himself as Manuel Negroni, had conversations with Miller with reference to the shipment of liquor to Anthony Craig and future shipments of liquor to

him. He arranged with Miller for the shipment to him, as a representative of Craig, of liquor to take the place of the shipment to Craig alleged to have been lost. The liquor was thereafter shipped to an address in the Southern District of New York. Upon its delivery it was found by Agent Olivera, who tasted it, to be intoxicating liquor fit for use for beverage purposes. (R. 76–77.) As late as January 5, 1931, Olivera had seen on the outer door of Room 604 the sign "The Southern Agency, D. M. Lefkowit." (R. 77.)

On January 9, 1931, Olivera called Chickering 4–8928, the number of the telephone in Room 604, and talked to Pauline Paris, who told him that she could receive orders for liquor and asked whether the "stuff" that he had received was all right. Upon Olivera's asking for an appointment with Miller, she said that Miller was not in, but that he could talk to his partner. A man then came to the telephone who also asked whether the "stuff" Olivera had received was all right. In the conversation which followed it was arranged that Olivera should call at Room 604 at 3 o'clock p. m. on January 12, 1931, to see Miller with reference to further orders and deliveries of liquor. (R. 36–37.)

On January 12, 1931, Agent Olivera appeared before a United States Commissioner and swore to a complaint charging that commencing on or about June 21, 1930, "and continuing thereafter down to

the present time," Henry Miller, "Jane Doe," and others had conspired with each other and with divers other persons, to the deponent unknown, to sell, possess, transport, furnish, deliver, and take orders for intoxicating liquor containing more than one-half of 1 per cent of alcohol by volume and fit and intended for use for beverage purposes, without permits, contrary to the National Prohibition Act. The complaint alleged that it was a part of the conspiracy that the defendants should solicit through the United States mails and by other means, from an office in Room 604, at 1547 Broadway, New York City, where the defendants pretended to do a real estate business under the name "The Southern Agency—D. M. Lefkowit," orders for intoxicating liquor from divers persons throughout the United States, and should arrange to have intoxicating liquor sent and delivered by express companies, automobiles, and other carriers to the purchasers of said liquor, to collect money in payment of said liquor, and to share in the proceeds of the illegal scheme. (R. 71–73.) Among the overt acts alleged were the sending of letters by the defendant Miller to C. F. Odell; conversations had with the deponent by the defendants "Jane Doe" and Henry Miller, and the transportation by the defendants of one case of Scotch whiskey on or about January 7, 1931, within the Southern District of New York. (R. 73–74.)

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As the source of the information upon which the complaint was based, Olivera averred that he had read letters sent by the B. & O. Novelty Company and by Henry Miller soliciting orders for intoxicating liquor from C. F. Odell, which letters were then in the possession of the deponent and copies thereof annexed to the complaint; that he had read the official reports of, and had talked personally with, Special Agent J. M. Hugo with reference to correspondence had between Hugo, using the name Anthony Craig, and the defendant Henry Miller regarding a shipment of liquor made by Miller to Craig on or about October 28, 1930; that he had examined the photostatic copy of a bank draft sent in payment for such liquor and that the name "Henry Miller" appeared as one of the endorsers of that draft; that the deponent, using the name Manuel Negroni, had had conversations with the defendants Henry Miller and "Jane Doe" regarding the shipment by Miller to Craig and proposed shipments of liquor by Miller to the deponent; and that the deponent had examined the contents of a shipment delivered within the Southern District of New York pursuant to an arrangement made by the deponent with the defendants Henry Miller and "Jane Doe," and had found such shipment to contain intoxicating liquor fit for use for beverage purposes. (R. 75–77.)

Upon the filing of the complaint the United States Commissioner issued a warrant for the ar-

rest of the defendants named therein. (R. 82.) The warrant and a certified copy of the complaint were delivered to Deputy United States Marshal Morgenstern, who proceeded with them in his possession to 1547 Broadway, accompanied by Special Prohibition Agents Olivera, Delmore, Guilfoyle, and Gaughan, who were to identify the persons designated in the complaint and warrant and to assist in making the arrests. (R. 31–32.) Olivera entered Room 604 in advance of the other officers, ostensibly to keep the appointment he had with Miller for that afternoon. Upon seeing him, Miller said, "Come on in," and was leading him into the inner office when the other Federal officers entered. Olivera pointed out Miller to the deputy marshal, saying: "That is Henry Miller." Morgenstern then informed Miller that he had a warrant for his arrest and placed him under arrest. At the time of his arrest Miller gave his true name as Daniel Lefkowitz. Following the arrest, Special Agent Delmore searched the person of Lefkowitz and took therefrom and turned over to Morgenstern the papers and articles mentioned in the affidavit made by Delmore. (R. 32–33, 37–38, 39, 45, 64–65.)

After the arrest of Lefkowitz the Special Agents conducted a search of Room 604, which is about 10 feet wide and 20 feet long and is divided by a partition into an outer and inner office. (R. 38, 45.)

They found in a desk in the outer office the notebooks and papers described in the affidavit of Agent Guilfoyle (R. 46–47); in a desk in the inner office, and in the waste paper baskets, the articles mentioned in the affidavit of Agent Delmore (R. 67–68); and in a towel cabinet, several typewritten sheets containing the names and addresses of numerous persons throughout the United States. (R. 49.) These articles were seized by the Agents and eventually turned over to Assistant United States Attorney Grant. (R. 19–20.)

While the search of Room 604 was in progress a young lady entered and was pointed out by Agent Olivera as the "Jane Doe" referred to in the complaint and warrant of arrest. She was placed under arrest by Deputy Marshal Morgenstern, to whom she gave her name as Pauline Paris. (R. 33, 38, 47.) At the suggestion of Agent Olivera, she voluntarily typed, and wrote her signature on, the following letter (R. 48):

> ULYSSES GRANT,
> *Post Office Bldg., New York City.*
>
> MY DEAR MR. GRANT: Since everything has gone fine, I would suggest that this girl whose name is signed below be left out as soon as bail is arranged for her.
>
> Very truly yours,
>
> J. RAY OLIVER.
>
> (S.) PAULINE PARIS.

As stated in the affidavit of Agent Olivera, this letter was procured by him partly with the bona fide intention of facilitating her release on bail and partly to obtain her signature and a sample of her typewriting when using the machine which was in Room 604. (R. 40, 47–48.) Olivera later arranged to have the United States Commissioner remain in his office until the prisoners were brought before him, and they were arraigned and released on bail that evening. (R. 41.) No force was used by the officers in conducting the search, nor were the desks or the cabinet broken into, as none was locked. (R. 49, 69.)

Following a hearing, the application to suppress, etc., was denied by the District Court (R. 92), which rendered a written opinion (R. 84). Upon appeal, the order of the District Court was reversed by the Circuit Court of Appeals as to all the property seized, except that taken from the person of the respondent Lefkowitz and the letter written by the respondent Paris, on the ground that the search and seizure were unreasonable. (R. 114.) Circuit Judge Swan, dissenting, expressed the view that the seizure was lawful except as to certain items which appeared to have no relation to the crime with which Lefkowitz was charged. (R. 118.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the search of the premises and the seizure of the books and papers were unreasonable.

REASONS FOR GRANTING THE WRIT

Both courts below regarded the disposition of this case as dependent upon the proper effect to be given the decision of this Court in *Go-Bart Co.* v. *United States,* 282 U. S. 344, holding the search there involved unreasonable. The District Court thought that that decision should be confined to the particular facts which this Court then had under consideration. The Circuit Court of Appeals, however, treated the search in this case as a general, exploratory search for evidence within the condemnation of the *Go-Bart case.* The Government believes that the District Court was correct, and that the decision of the Circuit Court of Appeals not only erroneously interprets the *Go-Bart case,* but is in substantial conflict with the decision of this Court in *Marron* v. *United States,* 275 U. S. 192.

The opposing constructions placed by the courts below upon the *Go-Bart* decision reflect the widespread uncertainty which prevails among Federal enforcement officers and the lower Federal courts as to the true scope and effect of that decision. It seems to be generally agreed that the officer making a lawful arrest still has the right to conduct a contemporaneous search of the premises under the immediate control of the person arrested in order to find and seize the things used in committing the offense for which the arrest was made; that the fact that articles coming within that description are books or papers, evidentiary in character,

is no bar to their seizure; and that, having the right to search, the officer not only has the right but is in duty bound to make a thorough search. But at what point he must stop in his search and refrain from taking articles used in committing the offense is left in doubt by the *Go-Bart case*. It is therefore of the utmost importance that this Court determine whether the search conducted in the case at bar was lawful, in order that the law may be clarified and so that arresting officers may be properly instructed as to what is a reasonable search incident to a lawful arrest to the end that the constitutional rights of those arrested may be strictly observed without unduly hampering the effective enforcement of the law.

Wherefore it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1931.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 84) is reported in 47 F. (2d) 921. That of the Circuit Court of Appeals (R. 114) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 21, 1931. (R. 119.) The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATEMENT, ETC.

The question presented, statement of the case, and the specification of error relied upon are set out in the petition.

ARGUMENT

I

THE ARRESTS WERE LAWFUL

The District Court held that the arrests were lawful (R. 84), and the Circuit Court of Appeals said that they were "to be treated as having been made lawfully" (R. 114). For the following reasons the Government submits that the arrests were lawful:

1. The arrests were made by a Deputy United States Marshal upon a warrant of arrest issued by

a United States Commissioner and addressed to the United States Marshal or to any of his deputies. (R. 33, 82.) The complaint upon which the warrant issued adequately charged a conspiracy to violate the National Prohibition Act (R. 71–75), and was supported by a statement under oath by Special Agent Olivera of facts within his knowledge which were ample to show probable cause for belief that the accused had committed the offense charged (R. 75–78). Before the arrests, the respondents Lefkowitz and Paris were identified by Olivera as the Henry Miller and "Jane Doe" named in the complaint and warrant of arrest. (R. 32–33.)

2. The previous dealings between Agent Olivera and the accused afforded reasonable ground for belief that the persons arrested had committed the felony of conspiring to violate the National Prohibition Act. *Kurtz* v. *Moffitt*, 115 U. S. 487, 504; *Brady* v. *United States*, 300 Fed. 540, 543 (C. C. A. 6th), certiorari denied, 266 U. S. 620.

3. Olivera's prior transactions with the accused in Room 604, including the appointment to discuss the sale of liquor with Lefkowitz at about the time of the arrests, constituted ample ground for belief that the conspiracy was still on foot when he entered that room and found Lefkowitz there apparently ready to accept orders for the delivery of liquor in violation of Section 19 of Title II of the National Prohibition Act, 41 Stat. 313 (U. S. C., Title 27, Sec. 31), *infra*, p. 26. *Lambert* v. *United States*, 282 Fed. 413, 417 (C. C. A. 9th); *Ash* v. *United States*, 299 Fed. 277, 279 (C. C. A. 4th).

II

SINCE THE ARRESTS WERE LAWFUL, SEARCH OF THE PREMISES WHERE THEY WERE MADE WAS LAWFUL; AND THAT SEARCH WAS NOT UNREASONABLE

It is well settled that, upon making a lawful arrest, the arresting officer has the right without a search warrant contemporaneously to search the place where the arrest is made in order to find and seize things connected with the crime as the means by which it was committed. In *Marron* v. *United States*, 275 U. S. 192, 198–199, this Court said:

> The officers * * * lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra*, 30 [269 U. S. 20, 30]; *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States, supra*, 392 [232 U. S. 383, 392]. * * * The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose.

In the *Marron case* the premises searched consisted of an entire second floor, including six or seven rooms. The officers took a ledger which they found in a closet. This Court held the seizure proper as incident to Birdsall's arrest, on the ground that the ledger was in his immediate possession and control. The Court also upheld the taking

of papers lying beside a cash register.[1] Here the premises searched consisted of a business office room about ten feet by twenty feet, divided by a partition. The books and papers seized were taken from unlocked desk drawers, an unlocked towel cabinet, and waste paper baskets.

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, however, this Court pointed out that a search incidental to a lawful arrest may be invalid because unreasonable within the prohibition of the Fourth Amendment; and both courts below treated this case as dependent upon the proper construction of that decision. The District Court said (R. 87):

> Much stress was laid in argument on the *Go-Bart* case. Each side claimed to benefit by it. I think, however, that what was there said is to be confined to the facts then under consideration and that it has no pertinency to the facts in the case at bar. I feel strongly that it was not the intention of the Supreme Court to depart from well-settled principles, theretofore announced by it in a long line of decisions.

The majority opinion of the Circuit Court of Appeals reads (R. 117):

---

[1] It is true that the officers in the *Marron case* were executing a valid search warrant for intoxicating liquor and articles for the manufacture of liquor; but, as this Court expressly held, the search warrant did not justify seizure of the ledger and papers which were not described in it. Thus the right to search for and seize such papers was held in that case to be incident to the arrest.

> * * * what are called general exploratory searches throughout premises and personal property are forbidden. It does not matter whether the premises are comparatively large or small, whether the articles of personal property opened and the contents examined are numerous or few, the right of personal security, liberty and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. * * * Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States,* 275 U. S. 192, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344. Indeed, this case differs in its essential facts from that one so slightly that what is said in that opinion characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable.

In his dissenting opinion, Circuit Judge Swan, after citing *Marron* v. *United States, supra,* and other cases, said (R. 118):

> The cases above cited would seem to justify the search and seizure made by the officers within the small rooms occupied by the prisoner when arrested in the case at bar. Nor

> do I read the opinion of the Supreme Court in the recent *Go-Bart case*, 282 U. S. 344, as laying down a contrary rule. There the search was deemed unreasonable because of fraud and threats of force by means of which the officers gained access to the locked desks and safe. Here there was nothing of that sort.

In the *Go-Bart case*, prohibition officers possessing a warrant for the arrest of Gowen and Bartels arrested them for the felony of conspiring to violate the National Prohibition Act, made a thorough search of the premises where they were doing business, and seized papers and documents. Proceedings were brought to secure the return of the seized articles and for the suppression of their use as evidence. The Government conceded that the warrant was invalid, but contended that the arrests for felony were lawful without a warrant, and that the officers had the right, incident to the arrest, to search the premises for the means used to commit the crime.

This Court expressly assumed that the arrests were lawful. It held, however, that the search was invalid because unreasonable within the meaning of the Fourth Amendment, saying (pp. 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the

officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the

arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

The Court here lays down the rule that in the determination of the reasonableness of a search each case is to be decided on its own facts. We submit that on its facts the instant case is plainly distinguishable from the *Go-Bart case*. In view of Olivera's previous dealings with the respondent Lefkowitz in Room 604 where the arrests were made, and of his appointment to meet him there on the afternoon of the search to discuss the sale of liquor, and of the fact that Lefkowitz showed by his greeting that he was expecting Olivera, it could not be doubted that when Olivera and the other officers arrived Lefkowitz was then engaged in carrying on the illegal business which was the object of the conspiracy. Unlike the *Go-Bart case*, where no overt act was alleged to have been committed by any conspirator within six months of the arrest and search, the record in the instant case shows the felonious conspiracy was still on foot. Only three days before the search Agent Olivera had a telephone conversattion with the conspirator Pauline Paris, in which she declared that she was authorized to take orders for liquor and inquired whether the liquor previously sent by Lefkowitz to

Olivera was good. She then said he could talk to "Miller's" partner and make an appointment with "Miller." The appointment for the day of the arrest was then made. Here, also, the officers procured a valid warrant of arrest, made no claim that they had a search warrant, and used no threats or show of force to compel the opening of locks. True, the search was thorough and included the desks, waste-paper baskets, and a towel cabinet. But, having the right to search for the means used in the commission of the offense for which Lefkowitz was arrested, the officers would have been derelict in their duty if they had omitted to examine every part of the premises where there was any likelihood that such articles might be found.

The fact that the search was not for definite and specific articles but for whatever was used as a means of committing the offense did not, we submit, render the search objectionable as a general, exploratory search for evidence. In the *Marron case, supra,* the officers were not aware of the existence of the ledger until they found it, and then did not know that it was a means of committing the offense for which the arrest had been made until they had opened it and examined its contents. That it was not a specific article for which they were searching was not regarded by this Court as barring their right to seize it.

The court below failed to recognize the distinction between a search authorized by a search warrant and a search authorized by a lawful arrest.

As pointed out by this Court in the *Marron case, supra,* nothing can be searched for or seized under a search warrant except that which is specifically described in it, whereas upon a lawful arrest the arresting officers have the right to search for and seize any article used in the commission of the offense for which the arrest was made. See also *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *United States* v. *Lee,* 274 U. S. 559, 563. A search of the latter sort is necessarily general in the sense that it is for things the existence of which can not be known until they are found; and if the things found and taken in the course of such a "general" search come within the description of articles which may in such case lawfully be searched for and seized, the fact that they furnish documentary proof of guilt does not, we submit, render the search unreasonable. In the *Carroll case, supra,* at page 158, it was expressly held that such things "may be seized and held as evidence in the prosecution," and this was the effect of the other decisions in which such searches have been upheld.

Judge Swan, in his dissenting opinion in the court below, held that Items 2, 3, 4, and 10 (R. 46, 47) "do not appear to have any relation to the crime with which Lefkowitz was charged." He considered the other items (R. 46, 47, 49, 67, 68), which were apparently used in connection with the illegal conspiracy, to have been validly seized. The

Government does not contend that items which appeared to have no relation to the crime should not be returned. It does contend, however, that most of the items here seized were "things used to carry on the criminal enterprise" within the rule stated in the *Marron case*, *supra*, at page 199, and that the court below erred in directing that these items be returned to the petitioners.

We submit that the search in this case comes within the rule held to govern in the *Marron case*, and is lacking in those factors the sum of which was regarded in the *Go-Bart case* as rendering unreasonable the search there involved. Under the construction of the latter decision by the court below, practically nothing is left of the rule that a search may be made as incident to a lawful arrest.

CONCLUSION

The decision of the Circuit Court of Appeals in this case is substantially in conflict with the decision of this Court in *Marron* v. *United States*, 275 U. S. 192, and erroneously construes the decision of this Court in *Go-Bart Co.* v. *United States*, 282 U. S. 344. A clarification of the latter decision is of the utmost importance to enable the proper instruction of arresting officers as to what is a reasonable search incident to a lawful arrest so that the constitutional rights of those arrested may be strictly observed without unduly hampering the

effective enforcement of the law. The petition for certiorari should therefore be granted.

Respectfully submitted.

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OCTOBER, 1931.

APPENDIX

STATUTE INVOLVED

Section 19 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 313 (U. S. C., Title 27, Sec. 31), provides:

> No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this chapter.

Section 29 of Title II of the National Prohibition Act, c. 85, 41 Stat. 305, 316 (U. S. C., Title 27, Sec. 46), provides in part:

> Any person * * * who * * * violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than 90 days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years.

U. S. GOVERNMENT PRINTING OFFICE: 1931

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 466

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL M. LEFKOWITZ AND PAULINE PARIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

On page 15 of the brief in opposition respondent quotes a statement from the Government's petition for certiorari to the effect that the court below failed to recognize the distinction between a search under a search warrant and a search incident to a lawful arrest and states that there is no such distinction. *United States* v. *Kirschenblatt*, 16 F. (2d) 202 (C. C. A. 2d), is relied on and supports the contention. But in *United States* v. *Poller*, 43 F. (2d) 911, 913, and *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Circuit Court of Appeals for the Second Circuit, which court decided the instant

case, held that the *Kirschenblatt* case was overruled by this Court in *Marron* v. *United States*, 275 U. S. 192. The *Gowen* case was reversed by this Court in [illegible] but the Court did not define the limits of reasonable searches made at the time of arrest, nor did it adopt any such rule as that announced in the *Kirschenblatt case*.

For the reasons stated in our brief review is sought because of the doubt which arises as to whether the instant case falls with the *Marron case* into the category of reasonable searches or with the *Go-Bart case* into the category of unreasonable searches. The decisions of the Second Circuit seem to emphasize this doubt.

Respectfully submitted.

[illegible],
Solicitor General.

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